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THE PSYCHOLOGY OF CONDEMNATION: UNDERLYING EMOTIONS AND THEIR SYMBOLIC EXPRESSION IN CONDEMNING AND SHAMING*

Sharon Lamb[†]

It is not so difficult for the general public, along with many a philosopher, to distinguish between judging and condemning. Roger Wertheimer reminds us that abstaining from judgment is not an option for human beings.¹ While lawyers, philosophers and psychologists alike would agree that the cognitive act of judging is integral to moral practice in any culture, condemning, its emotional sister, may be even more profoundly connected to morality. Judgments are anchored by social standards of behavior, which may shift by way of changes in time and differences in place. In contrast, condemnation is more unpredictable and less controllable, stemming as easily from an emotional impulse as from an awareness that someone has violated an important social norm.

Dan Kahan argues that emotional impulse always underlies judging and we fool ourselves to think otherwise.² He suggests that an affect-laden perception arrives on the scene before cognition kicks in and that all subsequent doctrine conforms to it. He even goes so far as to argue that the law cannot be based on anything else; it will always be reduced to these primal reactions.³ In an earlier essay, Kahan went further to argue that an emotional impulse such as disgust

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¹ See Roger Wertheimer, *Constraining Condemning*, 108 *ETHICS* 489 (1998).

² Dan Kahan, *The Aesthetics of Blame in Criminal Law*, Remarks at the Brooklyn Law School Center for the Study of Law, Language & Cognition Symposium, Responsibility & Blame: Psychological & Legal Perspectives (Oct. 18, 2002) [hereinafter Kahan Remarks].

³ See *id.*

might be an important basis for legal judgments.⁴ However, other scholars, like Martha Nussbaum and Toni Massaro, write on the danger of using emotional impulses, such as disgust, as the basis for legal judgments.⁵ All agree that the emotion of disgust may be a prime motivator, sometimes appropriate and sometimes not, of condemnation.

This Article examines fear, one of the so-called "universal" emotions, that may underlie more advanced emotions such as guilt, shame and disgust. I use the word "advanced" as a developmental psychologist does, although there are evolutionary implications therein. Fear is an emotion that is present very early on in life and is identifiable in most cultures.⁶ Guilt, shame and disgust, the moral emotions, appear after the second year of life when an awareness of standards emerges.⁷

In this Article, I discuss the emotions underlying condemnation from a psychological perspective and go on to look at a particular kind of fear as a root cause of condemnation. In the first Section, I examine the need to express condemnation for certain events from both a social psychology perspective as well as an individual psychology perspective. Section II explores the emotion fear as it underlies

⁴ See Dan H. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 594 (1996) [hereinafter *Alternative Sanctions*]. See also Dan Kahan, *The Progressive Appropriation of Disgust*, in THE PASSIONS OF LAW 63 (Susan A. Bandes ed., 1999).

⁵ See Martha C. Nussbaum, *Secret Sewers of Vice*, in THE PASSIONS OF LAW, *supra* note 4, at 19; Toni Massaro, *Show (Some) Emotion*, in THE PASSIONS OF LAW, *supra* note 4, at 80.

⁶ Emotion theorists who do cross-cultural work seem to agree that fear is universal. Even cultural constructionists would argue that a variant of fear is present in all cultures even though the source of that fear would vary. See DYLAN EVANS, EMOTION: THE SCIENCE OF SENTIMENT 1-17 (2001) and RANDOLPH R. CORNELIUS, THE SCIENCE OF EMOTION: RESEARCH AND TRADITION IN THE PSYCHOLOGY OF EMOTIONS 35-36, 189-92 (1996) for general overviews of the research on the universality of certain emotions.

⁷ The emergence of an awareness of standards in the second year of life has been observed by Jerome Kagan in THE SECOND YEAR: THE EMERGENCE OF SELF-AWARENESS (1981) and Sharon Lamb in *First Moral Sense: An Examination of the Appearance of Morally Related Behaviors in the Second Year of Life*, 22 J. MORAL EDUC. 97 (1993). See also Deborah Stipek et al., *Self-evaluation in Young Children*, in MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT 57 (1992). Facial expressions and behaviors presumed to reflect shame and guilt have been shown to appear in the third year of life. See MICHAEL LEWIS, SHAME: THE EXPOSED SELF (1992); Karen C. Barrett et al., *Avoiders versus Amenders: Implications for the Investigation of Guilt and Shame During Toddlerhood?*, 7 COGNITION & EMOTION 481 (1993). For a discussion of the development of disgust, see WILLIAM I. MILLER, THE ANATOMY OF DISGUST 12 (1997).

the urge to condemn and is expressed in a disguised form, dressed in indignation. Having explored the relationship of fear to condemnation in both criminal and tort cases and its roots in early childhood, I go on to examine the parenting function of the law in addressing those fears. Thus, drawing on research on effective parenting and using parenting as a model judicial system, Section III explores how society can address the fear that underlies over-reaching condemnation. Section IV looks at shaming sanctions through the lens of parenting and discusses alternate condemning practices that may be more effective, not only in terms of deterrence, but in terms of the moral development of individuals. This Article concludes in Section V that the law, as a collective expression of cultural values, must establish moral standards to balance its condemnatory function, a function which, alone, fails to address our societal ideals.

I. THE NEED TO EXPRESS CONDEMNATION FOR CERTAIN TRANSGRESSIONS

Condemnation would not be such a controversial and institutionalized practice if it didn't meet the needs of a culture on a variety of levels. Condemnation can serve social needs, personal needs and unconscious needs. Below I describe the kinds of needs that condemnation satisfies, enabling an examination, in the next Section, of the function of condemnation in addressing primitive and early fears that are aroused when those around us transgress certain social norms.

A. *The Social Need to Express Condemnation*

Condemnation serves a social function, communicating to members of society that *we* don't do that (whatever the transgression might be)—that we abhor that act, that way of thinking and that lack of feeling that may have led to the transgression.⁸ The law provides boundaries around behavior serving as “a continuous, repetitive set of instructions as to how we should think about good and evil, normal and pathological, legitimate and illegitimate, order and disorder.”⁹

⁸ See Jennifer Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1130-38 (2003).

⁹ David Garland, *Punishment and Culture: The Symbolic Dimension of*

The expression of condemnation binds people in a society together in common feeling when a boundary has been crossed.

In its communicative function, condemnation also makes a claim to objectivity and impersonality.¹⁰ While vengeance and vindictiveness are more personal responses, sometimes rightfully felt as a response to a violation of our rights,¹¹ sometimes serving baser goals, condemnation has an air of objectivity. We condemn, or we like to believe we condemn, on behalf of some larger moral principle.

Condemnation can also be assaultive.¹² Through condemning a wrongdoer, we may want to see him or her squirm or show some other sign of suffering. This also may serve a social and communicative function in that public displays of suffering can offer a form of deterrence to would-be transgressors and can solidify community through an expression of a boundary: "These acts will not be tolerated."

The assaultive potential of condemnation suggests an important distinction that is frequently blurred in the process of condemning and punishing, that there is a difference between condemning the act and condemning the agent. Although the law addresses acts, information about intent and character is frequently a part of indicting, trying and sentencing a criminal. Separating the act from the self is harder to achieve than one might guess, and while the intent may be to focus on a specific act, moral outrage is more easily expressed to an individual.¹³

Another function of condemnation is its service in a culture that has an ambivalent relation to the emotion of anger. Condemnation gives authoritative approval to the expression of anger, vindictive feelings and moral superiority in certain circumstances where, for the most part, such feelings, in ordinary social relations, are often kept under wraps. Indeed, Carol Tavris's point that the expression of anger

Criminal Justice, 11 STUDIES L. POL. & SOC'Y 95 (1991).

¹⁰ See Wertheimer, *supra* note 1, at 499.

¹¹ Jeffrie G. Murphy, *Two Cheers for Vindictiveness*, 2 PUNISHMENT & SOC'Y 131, 133-35 (2000).

¹² Wertheimer, *supra* note 1, at 493.

¹³ See Michael Corrado, *Notes on the Structure of a Theory of Excuses*, 82 J. CRIM. L. & CRIMINOLOGY 465 (1992) (discussing character theory and how, in excuse-making, the perpetrator sets his self apart from his act). See also Jeffrie G. Murphy, *Forgiveness and Resentment*, in FORGIVENESS AND MERCY 14, 24 (Jeffrie G. Murphy & Jean Hampton eds., 1988) (reminding us of St. Augustine's injunction to "hate the sin but not the sinner").

is more acceptable for those in power, than for those not in power,¹⁴ implies that condemnation may serve the "little guy" by democratically allowing all of us, at some time or another, to feel superior and express justified anger. While this may seem like a personal benefit, it is still a social one. In a democratic society replete with hierarchies and deep class and racial inequities, the opportunity to condemn someone lower than oneself relieves the tension of racial and class differences.

Finally, Jennifer Robbennolt, John M. Darley and Robert J. MacCoun argue that condemnation arises when there has been an incursion onto a community's sacred values.¹⁵ Moral outrage and punitiveness are the response to such incursions, followed by attempts to cleanse the community by distancing oneself from the offender and the offense.¹⁶ Sacred values, however, are not only products of community consensus; they also hold deep, personal meaning for individuals. Otherwise it would be difficult to arouse the requisite emotion necessary to condemn. Sacred values are sacred because they reflect our ideas of the moral worth of individuals and the importance of certain relationships. Feelings about our worth as individuals and about what we can and should expect from other people are grounded not only in social practices but in individual development within the culture.

B. *The Personal Need to Express Condemnation*

Before addressing the individual or personal need to condemn, it is important to understand why the law should consider an individual's personal need to condemn. After all, isn't the law a social mechanism meant to rise above the selfish or idiosyncratic impulses of the individual? There are, however, two reasons for the law to take into consideration the individual's need to condemn. The first takes the meaning of individual needs quite literally and suggests that such individual needs can interfere with the social goals of equity and objectivity in the court. This might occur through, for

¹⁴ See CAROL TAVRIS, *ANGER: THE MISUNDERSTOOD EMOTION* 198 (1982).

¹⁵ Robbennolt et al., *supra* note 8, at 1133-34.

¹⁶ This theory is laid out in Robbennolt et al., *supra* note 8; however, this work derives from Philip Tetlock et al., *The Psychology of the Unthinkable: Taboo Trade-Offs, Forbidden Base Rates, and Heretical Counterfactuals*, 78 J. PERSONALITY & SOC. PSYCHOL. 853, 853-56 (2000).

example, individual jurors, who introduce their own idiosyncratic concerns in the guise of social concerns in jury deliberation, and judges whose emotional impulses and personal histories may lead to statements or sentences that express condemnation in ways that go beyond the law.¹⁷

The second reason takes the meaning of individual needs to mean "human" needs, needs that each of us most likely harbors based on similar experiences in our culture of having once been infants, having once been parented and having been brought into the culture by shared socialization practices, the meanings of which we share. For instance, we all have dependency needs, some more than others, and these needs are deeply human, formed and shaped early on, through our own histories with our parents and through the cultural practices that influenced their caregiving.¹⁸ The urge to please important others whom we admire is another example of a human need. Our individual experiences of being parented as well as the cultural rules that define the relations between children and adults influence how we express these needs.

C. *The Unconscious Need to Express Condemnation*

Thus, in discussing the relationship between individually felt human needs and their relation to the law, it may be useful to return to the psychoanalytic concept of unconscious needs and impulses. According to object relations

¹⁷ See Laura E. Little, *Adjudication and Emotion*, 3 FLA. COASTAL L.J. 205 (2002) (discussing emotions such as disgust and hate as motivators of judges' decisions).

¹⁸ In this latter meaning of individual needs, the individual is not separate from the social, which is, of course, a false distinction. Note that I am careful to describe a cultural basis for these shared human impulses along the lines of Richard Shweder and Robert Levine expressed in *CULTURE THEORY: ESSAYS ON MIND, SELF, AND EMOTION* (1984); Anna Wierzbicka, *Emotion, Language, and Cultural Scripts*, in *EMOTION AND CULTURE: EMPIRICAL STUDIES OF MUTUAL INFLUENCE* 138 (Shinobu Kitayama & Hazel Rose Markus eds., 1994); CATHERINE A. LUTZ, *UNNATURAL EMOTIONS: EVERYDAY SENTIMENTS ON A MICRONESIAN ATOLL & THEIR CHALLENGE TO WESTERN THEORY* (1988); and JAMES R. AVERILL, *ANGER AND AGGRESSION: AN ESSAY ON EMOTION* (1982), anthropologists and social constructionists, for example, all of whom believe that even our basest impulses are shaped socially. This position does not discount evolutionary theory in total, but argues that whatever capacities that come to us via evolution or biology quickly are shaped through the culture via various cultural practices.

It may be helpful also to look at the growing literature on therapeutic jurisprudence for a discussion of the hoped for results when the law takes into consideration the psychology of individuals, at least within the lawyer-client relationship. See *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* (Dennis P. Stolle et al. eds., 2000).

theory, human needs are based on early experiences and, though common to all, are shaped through individualized social experiences, the earliest of which are with one's parents.¹⁹

Those who discuss the expressive function of punishment²⁰ seem to focus primarily on what punishments express to society, although within the last decade the therapeutic jurisprudence movement began focusing on what the law and lawyers express to clients in symbolic and unconscious ways.²¹ When examining the human emotions underlying punishment, scholars often take disgust, hatred and the desire for revenge at face value instead of seeking out other hidden emotions these expressed emotions might be serving. Jeffrie Murphy is savvy enough to note, in his article on shame, that "shame creeps through guilt and feels like retribution," suggesting complex and buried emotions underlying the urge to condemn.²² His writing is consistent with a psychoanalytic theory of the unconscious that puts forth a sort of hierarchical or layered approach to emotions wherein some emotions are more straightforward, on the surface, while others lie beneath. This idea of surface versus hidden emotion is central to psychoanalytic theory of the unconscious where emotions can be viewed as censored or acceptable, unconscious or conscious.²³

¹⁹ Object relations theory is an outgrowth of Freudian psychoanalytic theory. Although it shares with Freudian theory the principle of unconscious motivation, rather than placing sexual and aggressive impulses at the foundation of unconscious motivation, object relations theory places early feelings in relation to mothering (and sometimes parenting) as the basis of motivation. Object relations theorists include MELANIE KLEIN & JOAN RIVIERE, *LOVE, HATE, AND REPARATION* (1964). For several essays see also DONALD W. WINNICOTT, *THE MATURATIONAL PROCESS AND THE FACILITATING ENVIRONMENT* (1965); and W.R.D. FAIRBAIRN, *OBJECT RELATIONS THEORY OF THE PERSONALITY* (1954), all of whom differ in terms of what aspects of the early relationship are important, how psychic structures are formed based on these early relationships and to what extent abnormalities derive from normal versus defective parenting; however, these differences are not important for the purposes of this Article.

²⁰ Kahan Remarks, *supra* note 2; Jean Hampton, *The Retributive Idea*, in *FORGIVENESS AND MERCY*, *supra* note 13, at 111; JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* (1970).

²¹ See *supra* note 8; see also Symposium, *Therapeutic Jurisprudence and Preventive Law: Transforming Legal Practice and Education*, 5 PSYCHOL. PUB. POL'Y & L. 795 (1999); Gary Melton, *Therapy Through Law*, 39 CONTEMP. PSYCHOL. 215 (1994).

²² Jeffrie G. Murphy, *Shame Creeps Through Guilt and Feels Like Retribution*, 18 LAW & PHIL. 327, 342 (1999).

²³ Nietzsche is well known for his "psychoanalytic" view of the urge to condemn: namely, that it came from a combination of resentment, spite, malice and envy. See Jeffrie G. Murphy, *Moral Epistemology, the Retributive Emotions, and the "Clumsy Moral Philosophy" of Jesus Christ*, in *THE PASSIONS OF LAW*, *supra* note 4, at

Current studies of emotion often run up against the problem of studying emotions one by one; more typically, emotions are experienced simultaneously with other emotions. Those researchers who work with physiological measures have discovered that it is very difficult to identify discrete physiological responses for each emotion.²⁴ Moreover, social constructionists would argue that the boundaries around emotions, how we define an emotion and differentiate it from others, are a matter of cultural practice.²⁵ Still, psychoanalytic theory can be brought to bear on this problem of multiple emotions for, in layering emotions, the theory implies that more than one emotion is experienced at one time and that the more important emotion is the underlying one. Additionally, the psychoanalytic concept of ambivalence holds that people can, and often do, feel more than one way at the same time. Roger Wertheimer claims that we as a culture are deeply ambivalent about our urge to condemn.²⁶ The law, however, understandably does not like ambivalence because it is so difficult to state and enforce standards about which we feel ambivalent. Still, unconscious needs are often ambivalent and conflicting. Moreover, those needs that we keep from awareness are often in conflict with what we express.²⁷

Taking that bit of psychoanalytic theory as truth: What is the hidden side of condemnation? Where is the ambivalence? What is the unacceptable feeling? As Freud urged us to look at extreme cases to understand the psyche,²⁸ we can perhaps gain insight through examining the most extreme cases of condemnation, e.g., "runaway juries" who award exorbitant amounts to consumer plaintiffs or judges who, wrongly believing all sex offenders are incurable, throw the book at a "monster" of a man. In both of these cases disgust may be

154-55 (discussing Nietzsche's views on self-deception and cruelty as the basis of retribution).

²⁴ See CORNELIUS, *supra* note 6.

²⁵ For an excellent overview, see *id.*

²⁶ Wertheimer, *supra* note 1, at 490.

²⁷ This is a core understanding of psychoanalytic theory, that expressed emotion may not represent felt emotion and the individual might still be unaware of the felt emotion.

²⁸ Here I refer to Freud's famous metaphor of the psyche as a piece of crystal. When thrown to the floor, it breaks "not into haphazard pieces [but] comes apart along its lines of cleavage into fragments whose boundaries, though they were invisible, were predetermined by the crystal's structure." XXXI SIGMUND FREUD, *Dissection of the Personality*, in NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS AND OTHER WORKS 59 (James Strachey et al. eds. & trans., 1964).

present, but I argue that fear is the underlying emotion behind these condemnations. Before discussing the fear that underlies condemnation, however, it is important to examine the anger and outrage that seem more obviously to fuel the judgment.

Were we to ask those who condemn what they actually were feeling in the moment of condemnation, they would most likely describe anger and outrage, maybe even indignation, but not fear. In Western society, anger and outrage are more acceptable emotions to individuals than fear because as one experiences anger and outrage, and one has the option to act on these feelings, one often feels powerful. For Westerners, anger and outrage are associated with strength rather than weakness; but this is not true in all Western cultures. Linguist Anna Wierzbicka tells us that the Polish have a word for anger, *zlosc*, which connotes weakness—immaturity, lack of restraint, almost a childish rage.²⁹ But in the United States, one need only look at the last few decades worth of Schwarzenegger movies to understand that anger is action. It is force. While social constructionists argue that we feel anger as overwhelming us, as a passion that allows us to act on our anger without taking responsibility for the damage we might inflict, this does not contradict the authority, superiority and strength that anger affords us. As Carol Tavris and James Averill have each argued, those who are in a superior position in any hierarchy are given permission (and give themselves permission) to “lose control” and get angry, thus expressing superiority and authority as well as strength through anger.³⁰ In experiencing anger, we rarely feel like “the victim.” In fact, therapy with victims frequently involves getting in touch with one’s anger as a form of self-empowerment.³¹

Fear, on the other hand, is, well, it’s frightening. Why? Because it is so difficult to sit with it. When jurors feel afraid, they feel vulnerable and too much like the victim who was harmed by the offender. While we certainly go through rituals to distance ourselves from wrongdoers,³² we also go through

²⁹ See Wierzbicka, *supra* note 18.

³⁰ See James R. Averill, *Anger*, in NEBRASKA SYMPOSIUM OF MOTIVATION 1 (R.A. Dienstbier ed., 1978); TAVRIS, *supra* note 14.

³¹ See BONNIE BURSTOW, *RADICAL FEMINIST THERAPY: WORKING IN THE CONTEXT OF VIOLENCE* (1992) for a scholarly discussion. For a more popular approach to working with victims, see ELLEN BASS & LAURA DAVIS, *THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE* (3d ed. 1994).

³² Tetlock et al., *supra* note 16; Wertheimer, *supra* note 1; SHARON LAMB, *THE TROUBLE WITH BLAME: VICTIMS, PERPETRATORS, AND RESPONSIBILITY* (1996);

rituals to distance ourselves from victims.³³ Distancing is similar to the “flee” response, well known to be a response to fear, its psychological parallel.

Fear can have an internal as well as an external basis. Cognitive theorists might argue that all fear is based on internal factors, one’s attributions and assessments of what is fearful and how fearful a person or event actually is.³⁴ However, by internal I mean to refer to an internal source—fears about one’s self, one’s emotions, one’s potential for action. This view of internal fears stems from a psychoanalytic understanding of the unconscious. For example, an internal fear may be that one cannot control one’s anger, that it would destroy other people if one expressed it. In contrast, external fears are those fears based on the perception of actual threat to the self. An external fear would be about others’ anger destroying you. Of course, an external fear can be real, but it can also be based wholly or in part on a defense against the internal fear. I want to make clear from the outset that although I am focusing on these internal fears, projected outward, I take seriously the actual fear that wrongdoing in our world evokes in all of us, even when more primitive fears may influence the understanding and experiencing of that fear (caused by the horrors or indifference of the external world).

The primitive fears to which I refer relate to safety, security and our utter helplessness as infants when we enter the world. Fear is one such “primitive” emotion, not only because it is one of the “basic” emotions identified by evolutionary and emotion theorists,³⁵ but because it is an early emotion upon which social relations are built. A parent’s ability to soothe fears and provide a secure space for the infant and child to develop is fundamental to healthy development.³⁶

Collin O'Connor Udell, *Parading the Saurian Tail: Projection, Jung, and the Law*, 42 ARIZ. L. REV. 731, 751-53 (2000).

³³ LAMB, *supra* note 32.

³⁴ For a discussion of cognitive views of fear, see CORNELIUS, *supra* note 6.

³⁵ See Paul Ekman & W. V. Friesen, *Constants Across Cultures in the Face and Emotion*, 17 J. PERSONALITY & SOC. PSYCHOL. 124-29 (1971); Carroll Izard, *Innate and Universal Facial Expressions: Evidence from Developmental and Cross-Cultural Research*, 115 PSYCHOL. BULL. 288-99; ROBERT PLUTCHIK, *EMOTION: A PSYCHOEVOLUTIONARY SYNTHESIS* (1980). But saying that fear is basic doesn’t mean it’s the same in all cultures. Ekman and Friesen found that the Fore tribe in New Guinea and Western college students were least likely to agree on what constituted a “fearful” expression.

³⁶ This is a basic tenet of both the object relations theories and interpersonal theories that came out of traditional Freudian psychoanalytic theory, developed in the

This primitive emotion, fear, is dressed up to make it acceptable in two important ways. First, the individual psyche transforms less acceptable emotions into more acceptable or empowering ones, e.g., fear into anger. Second, we use the defense of projective identification, denying parts of ourselves and finding unconscious ways to make others live out these feelings for us.³⁷ Joan Riviere, an object relations theorist, wrote of projection:

The first and the most fundamental of our insurances or safety-measures against feelings of pain, or being attacked, or of helplessness—from which so many others spring—is that device we call projection. All painful and unpleasant sensations or feelings in the mind are by this device automatically relegated outside oneself; one assumes that they belong elsewhere, not in oneself.³⁸

Projective identification moves one step beyond projection by involving another in our fantasy, by in effect inducing another to play a role that satisfies our own disowned emotions. When we feel fear, through projective identification, we find a way to make someone else afraid so that we no longer have to own and experience that uncomfortable emotion. Condemnation serves this function by allowing us to deny our own fears, making those condemned quake at their punishment.

II. FEAR AS AN INTERNAL MOTIVATOR FOR CONDEMNATION OF CRIMINALS

W. Ian Miller writes that fear is “the passion which underwrites all coercive law.”³⁹ Because of fear, protection is one of the primary goals of the law and punishment. How,

1930s through 1960s. See HARRY STACK, SULLIVAN, *THE INTERPERSONAL THEORY OF PSYCHIATRY* (1953) (discussing the security dynamism of the infant); ERIK ERIKSON, *Eight Ages of Man, in CHILDHOOD AND SOCIETY* (1950) (discussing “basic trust”). W.R.D. Fairbairn, D.W. Winnicott and other object relations theorists assert that good enough mothering is essential to children’s healthy development. See, e.g., DONALD W. WINNICOTT, *Ego Distortion in Terms of True and False Self, in MATURATIONAL PROCESSES AND THE FACILITATING ENVIRONMENT* (1960). See also the developmental research on an infant’s need for a strong attachment in the work of 1 JOHN BOWLBY, *ATTACHMENT AND LOSS* (1969) and an earlier study by Rene Spitz, *Hospitalism: An Inquiry Into the Genesis of Psychiatric Conditions in Early Childhood*, 1 *PSYCHOANAL. STUD. CHILD* 53 (1945).

³⁷ Projective identification was first introduced to psychoanalytic theory by Melanie Klein. MELANIE KLEIN, *THE PSYCHOANALYSIS OF CHILDREN* (1932).

³⁸ JOAN RIVIERE, *Hate, Greed, and Aggression, in LOVE, HATE, AND REPARATION*, *supra* note 19.

³⁹ William Ian Miller, *Fear, Weak Legs, and Running Away: A Soldier’s Story, in THE PASSIONS OF LAW*, *supra* note 4, at 243.

then, does condemnation express that people in society are safe and need not fear? We have seen already how condemnation expresses moral outrage and confirms shared beliefs about what kinds of acts are terribly wrong, and how we use condemnation as a defense against fear, functioning as a show of force.⁴⁰ In such cases, to condemn says: "We are not afraid." One who condemns confronts, and confronts with legitimized authority; thus, condemnation transforms fear into strength.

Illustrating how fear motivates society's condemnation of murderers and rapists may be useful before moving on to more subtle cases involving negligence, especially cases of incommensurability, which I examine below. Finally, cases where motherhood is explicitly involved may be quintessential cases that evoke a certain kind of fear, which is dealt with more readily through condemnation.

It is easiest to see the fear beneath condemnation in criminal cases. Take, for example, the recent sniper shootings in the Washington, D.C. area. The community's fear, publicized and addressed in police broadcasts to the community, was palpable for the rest of the country as we watched the hunt for the snipers play out on television. The fear was great and the public condemnation of the shooters even greater,⁴¹ even though one was a seventeen-year-old boy.

Fear is also aroused in sex offense cases, particularly those involving child sex offenders. These criminals, more frequently men than women, are usually treated publicly as if they were monsters,⁴² although, in fact, they are a very diverse group. But while fear is somewhat present, anger and disgust are more salient. In the promotion of Megan's Laws around the country, the media and legislatures continue to portray the sex offender as the worst of the worst, incurable, insatiable, unable to exercise simple restraint and untreatable by medication or psychotherapy. Thus, the community must be notified of the

⁴⁰ See *supra* notes 8-11.

⁴¹ One *USA Today* poll showed over 50% of those in the Washington D.C. area had a "great deal of anxiety" over sniper shootings as well as terrorist attacks. Rick Hampson, *Nation Pulled Into Sniper's Widening Circle of Fear*, USA TODAY, Oct. 24, 2002, at A3. It was interesting to see the anger played out after the snipers were caught; states jockeyed for prosecutorial position to ensure that they were tried in a state that would permit execution as retribution. See *Shopping For Death*, ST. LOUIS POST-DISPATCH, Nov. 13, 2002, at B6.

⁴² See Mark Donald, *Hello My Name Is Pervert*, DALLAS OBSERVER, Jan. 11, 2001, available at <http://www.dallasobserver.com/issues/2001-01-11/feature.html/page-1.html> (last visited Mar. 3, 2003). For a scholarly treatment, see Udell, *supra* note 32.

offender's presence. Such notification, while it may ease fears within a community, often creates a danger for a recently released sex offender, who is then the target of outrage and disgust.⁴³

Of course we fear victimization—if not our own, then that of our children, and particularly our daughters, wives and sisters. Yet, the law has not historically been strong in its protection of the victims of sexual violence, which leads us to ask what other fears such harsh laws and media condemnation might address? My thought is that this condemnation reflects our culture's deep ambivalence about sexuality. We choose all forms of arousing entertainment, accept the commercialization of sexiness and support the sexualization of youth through the media; but we remain rather puritanical when it comes to the sexual impulses of youth and ourselves.⁴⁴ Sex offenders thus evoke a fear of our own sexuality, a fear that it will spiral out of control or that it can be disgusting and ill-placed. In over-punishing sex offenders, in creating monsters, we differentiate us from them and ease our self-conscious fears about our own sexuality.⁴⁵ More importantly, by turning them into monsters, we separate them from the people we know and love, fathers, stepfathers, uncles and cousins who are much more likely to be the sexual offenders in the lives of little boys, girls and women. The real fear is that someone like a father, someone who was meant to protect children, caused harm. When that happens, a

⁴³ See Lois Presser & Elaine Gunnison, *Strange Bedfellows: Is Sex Offender Notification a Form of Community Justice?*, CRIME & DELINQ., July 1999, at 299. They noted that such trouble ranges from threats to the offender from community members, as cited in Matthew Stadler, *Stalking the Predator*. N.Y. TIMES, Nov. 7, 1995, at A23; and Joel B. Rudin, *Megan's Law: Can It Stop Sexual Predators and at What Cost to Constitutional Rights?*, 11 WESTLAW CRIM. JUSTICE 1 (1996), to an inability of the state to place a halfway house among citizens. See Kevin Murphy, *State to Build Halfway House*, MILWAUKEE J. & SENTINEL, Apr. 21, 2001, at 3B. In one unusual community in Canada, an organization called "Circles of Support and Accountability" was started to help offenders returned to the communities to find housing and jobs and keep therapy appointments. Elsewhere, such support for offenders is rare. Tamsen Tillson, *Sex Offenders Find Hope Through Community Support Program*, 5 J. ADDICTION & MENTAL HEALTH 12 (2002).

⁴⁴ The call for abstinence programs by President George W. Bush, for example, reflects this puritanical aspect. See also Mark Whitaker, *The New Virginity: No Sex Until Marriage is Gaining Popularity Among Teens*, NEWSWEEK, Dec. 9, 2002, at 5. See JUDITH LEVINE, *HARMFUL TO MINORS* (2002); SHARON LAMB, *THE SECRET LIVES OF GIRLS: WHAT GOOD GIRLS REALLY DO* (2002) (discussing these trends).

⁴⁵ See LAMB, *supra* note 32; Sharon Lamb, *Constructing the Victim: Popular Images and Lasting Labels*, in NEW VERSIONS OF VICTIMS 108 (1999) [hereinafter *Constructing the Victim*].

primitive fear is aroused that necessitates seeing an offender as alien, a "loner," not like us, and, therefore, condemnable.⁴⁶

But what of the fear that cases of negligence arouse when some person or entity fails to take care. Even worse, what of the fear that cases of incommensurability arouse, when an institution or company puts a value on our safety or our lives, taking risks that put us in danger for financial reasons often based on a cost-benefit analysis. Robbennolt and her colleagues note that in cases of incommensurability, punitive damages awards are quite high.⁴⁷ The famous Ford Pinto case⁴⁸ seems the prototype of such cases; but more recently, the unprecedented punitive damages awarded to cigarette smokers seem to represent an unbounded outrage.⁴⁹ In cases of incommensurability, Robbennolt et al. observe that the wrongdoer seems quite separated from social norms in that he or they could put a pricetag on human life.⁵⁰

Robbennolt and associates suggest that the urge to condemn in these cases goes hand-in-hand with seeing the wrongdoer as less of a person.⁵¹ They propose that this may be an attempt to balance the power scale that such acts of wrongdoing tip. As in the case of sex offenders, seeing the wrongdoer as sub-human, as less of a person, may be a way of seeing the offender as alien, not us, and thus worthy of condemnation. Seeing a wrongdoer as less of a person, though ironically an agent still, makes it easier for a jury to impose exorbitant punitive damages, especially if this is the only means by which it can act aggressively toward the wrongdoer and make him suffer.

In cases of incommensurability, Robbennolt and colleagues argue, juries make a symbolic statement, showing the world that this kind of thinking or behavior is unacceptable.⁵² The exorbitant awards appear to address jurors' and the general public's outrage at an impersonal, material world. But the private is not so separate from the public. The

⁴⁶ See LAMB *supra* note 32; Udell *supra* note 32.

⁴⁷ Robbennolt et al., *supra* note 8, at 1138.

⁴⁸ Grimshaw v. Ford Motor Co., 191 Cal. Rptr. 348 (1981).

⁴⁹ See, e.g., Burton v. R.J. Reynolds Tobacco Co., 205 F. Supp. 2d 1253 (D. Kan. 2002) (awarding one smoker \$15 million in punitive damages); Engle v. R.J. Reynolds Tobacco Co., 122 F. Supp. 2d 1355 (S.D. Fla. 2000) (returning verdict of \$145 billion in punitive damages).

⁵⁰ See Robbennolt et al., *supra* note 8, at 1134-37.

⁵¹ *Id.* at 1139-41.

⁵² *Id.* at 1136-37.

desire to make some person or agency suffer for his inhumanity or negligence may arise not only from the outrage we experience knowing that large, impersonal organizations rule our lives, but also because the wrong act (or wrongful failure to act) has evoked our earliest and most primitive fear—that we won't be taken care of, that those in charge of our care can put their own needs ahead of ours. Clearly the outrage against negligent organizations is overdetermined, but even the rage against our feeling that the world is impersonal and dangerous hearkens back to infancy; the antidote for being treated impersonally and like a number is being treated as special, unique and important, which is fundamentally a part of parent/child love. While the act of condemning makes us feel strong and superior, money, or at least a verdict in our favor, is a sign of importance.

The infant who is not treated well rails against the loss of this basic right to be important.⁵³ Various psychologists and psychoanalysts call this right a sense of security, safety, basic trust and an experience of "going on being." The "mother" serves as the archetypal image of such care, although religion as a cultural institution also serves this primitive function for people.⁵⁴ Our urge to condemn in cases where a mother or father figure or institution doesn't care, and our urge to make someone suffer, to get even, speaks of an emotional hurt that needs soothing.

In cases of incommensurability and, at times, in cases of negligence, when juries unpredictably award huge punitive damages they may be making a symbolic expressive statement of their outrage, but they likely also want to express the more personal injunction that someone should have "taken care." Cass Sunstein, Daniel Kahneman and David Schkade note that punitive damages have a "retributive or expressive function designed to embody social outrage at the actions of serious wrongdoers."⁵⁵ What seems then to appear "arbitrary" and "unpredictable" in the doling out of damages may be a result of such punishments stemming not only from "social outrage" but also from "private fear." If a government or a company that is

⁵³ See *supra* note 36.

⁵⁴ This, of course, is one of the reasons why the outrage against the Catholic church runs so deep. The bishop did not protect. He put the church's needs before his parishioners' needs. ERIKSON, *supra* note 36.

⁵⁵ Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998).

supposed to nurture and support doesn't, it becomes the target for our most basic aggressive feelings. It becomes the bad parent that must be destroyed to restore the pleasant fiction of a secure world. Fear is about annihilation, and, as Neal Feigenson has shown us in his discussion of "Terror Management Theory," the unconscious effort to suppress fear, measured through making mortality issues more or less salient, leads people to punish more.⁵⁶

Condemnation, in the guise of impartiality, serves a psychic goal of punishing the bad parent who did not keep us safe. Laws demanding such care from governments and companies reinforce the profoundly human expectation that everyone should be cared for. When this expectation is challenged, when it becomes clear that those who have power over us may not care or could have put a monetary value to caring, we are more inclined to see the wrongdoer as less than human, a projective screen for evil, and to punish severely.

Defense lawyers sense this and do what they can to make defendants more individual and more human. When a judge or jury's impulse is to dehumanize the criminal, to make him part of an institution or a monster of greed, the only way to counteract this tendency is to re-humanize him. Bringing defendants' families into the courtroom is an effort to symbolize that a defendant can take care, that he or she is a caretaker.

The process of making monsters is a process that addresses underlying fears. Governments and corporations may be more vulnerable to being cast as monstrous and, as archetypically male institutions, come to represent the law of the father, stern and overly critical.⁵⁷ Whenever a defendant fits an archetypal image and evokes primal worries about annihilation, about who counts, and about who will take care of "me," I suspect juries and judges impose higher damage awards and stronger sentences. Susan Bandes writes about the problems of blaming entities rather than agents with "no soul

⁵⁶ See Neil Feigenson, *Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959, 972-73 (2003) for discussion. The reference for the research is Abram Rosenblatt et al., *Evidence for Terror Management Theory: I. The Effects of Mortality Salience on Reactions to Those Who Violate or Uphold Cultural Values*, 57 J. PERSONALITY & SOC. PSYCHOL. 681 (1989).

⁵⁷ The father has been cast in this role through Freudian theory; Freud wrote that the Super-Ego, based on identification with the father, was an overly harsh version of the father based on fear instead of actual personal relations. See FREUD, *supra* note 28.

to be damned, no body to be kicked.”⁵⁸ However, institutions can be personified and can come to archetypally represent certain classes of persons about whom we have feelings and expectations. For example, the Catholic church recently has taken a beating. While it is satisfying to some to point the finger at Boston’s Cardinal Law and see him step down, the church itself has lost the trust of many of its parishioners.⁵⁹ The best the church can do is to ask Catholics to separate their attitudes toward the wrongdoing priest from their attitudes toward the church. This would prevent parishioners from personifying the church as a parent who let them down and reconfirm their faith in God as the ultimate parent who provides.

While both institutional representations of mothers and fathers (like teachers and priests) may evoke equally strong reactions in us, actual mothers who are negligent or criminal seem to evoke much more public condemnation or confusion than actual fathers who do wrong. Because of the need to find archetypal representations, mothers are often initially portrayed by prosecutors and the media as monster criminals. Once again, our deepest fears of not being taken care of, deeper, I would argue, than disgust or shame, are most directly evoked when a mother doesn’t take care. Mothers who don’t protect their children well enough are blamed for the aggression perpetrated on their children by their boyfriends. Recently, in Chicago, Tabitha Pollock, a mother who was convicted of first degree murder of her daughter seven years ago was finally acquitted and released after Lawrence Marshall and associates at The Center for Wrongful Convictions at Northwestern University Law School took on her case and convinced the Illinois Supreme Court to overturn her conviction.⁶⁰ What was so interesting about this case was that Tabitha Pollock’s boyfriend, not she, was the murderer, that

⁵⁸ Susan A. Bandes, *Not Enough to Go Around: Reflections on Requiring Purposeful Government Conduct*, 68 BROOK. L. REV. 1195, 1199 (2003).

⁵⁹ Angie Cannon et al., *Catholics in Crisis*, U.S. NEWS & WORLD REP., Apr. 1, 2002, at 50.

⁶⁰ All Things Considered, (NPR radio broadcast, Nov. 27, 2002) (discussing the conviction and acquittal of Tabitha Pollock for the murder of her daughter). See also Adam Liptak, *Judging a Mother for Someone Else’s Crime*, N.Y. TIMES, Nov. 27, 2002, at A17. It is interesting that right after the state supreme court overturned the Pollock decision, another Chicago mother, Linda Kee, was charged with first degree murder after her boyfriend, who was babysitting, fatally beat her son, Anthony Moore, while she was at work. See Annie Sweeney, *Mom, Boyfriend Held in Child Death*, CHI. SUN TIMES, Nov. 27, 2002, at 11.

she was asleep when it happened, and that she expressed significant distress and guilt when she learned from the police that her boyfriend had murdered her daughter.⁶¹

Mothers like Ms. Pollock become sites of great cultural conflict—not just condemnation, but ambivalence.⁶² How could they not care? Headlines and news stories descriptively point to callousness for its shock value: Natalia Higier, 47, a Latvian native, “was more concerned about her dog than her child;”⁶³ and a Scottish newspaper headlined “Mother ‘smoked as baby was battered to death’” when Andrea Bone, a young mother, allegedly “sat on a sofa, smoking a cigarette and drinking a cup of coffee” as her baby was murdered.⁶⁴

In spite of such condemnation, very few mothers who have murdered their children have been put to death save for Christina Riggs.⁶⁵ Although she offered an insanity defense, which is typical of mothers who murder their children, she was executed by lethal injection in May of 2000.⁶⁶ In cases like Susan Smith⁶⁷ and Andrea Yates,⁶⁸ media stories focused on whether and how to hold these women responsible, searching, perhaps, for that syndrome or sign of insanity that would explain these horrible acts. The media first portrayed Susan Smith as getting rid of her children to further a love affair, but when information about her own childhood abuse was revealed, the media coverage was more sympathetic. Society came to view Andrea Yates’s murder of her four children as an act of a

⁶¹ Liptak, *supra* note 60, at A17.

⁶² There was also significant debate over Hedda Nussbaum, the mother who did little to prevent her adopted daughter, Lisa Steinberg’s sexual abuse, beatings and eventual death in New York in 1987. Nussbaum was present, using drugs with her boyfriend, Joel Steinberg, when Lisa lay dying near her on the floor. Some saw her as a victim of “Battered Women’s Syndrome.” Others reject the incapacitation argument, as there were numerous incidents in the life of this girl that received little attention. For more information on Nussbaum and the Steinberg case, see Mark Gabo’s *The Killing of Lisa Steinberg* at http://www.crimelibrary.com/notorious_murders/family/lisa_steinberg/1.html (last visited Mar. 5, 2003).

⁶³ Marie Szaniszló & David Weber, *Mother Nabbed in Tot’s Death*, BOSTON HERALD, Aug. 16, 2002, at 1.

⁶⁴ Frank Urquhart, *Mother ‘Smoked as Baby was Battered to Death’*, SCOTSMAN, Sept. 25, 2002, at 8.

⁶⁵ David Crary, *Beyond the Andrea Yates Case; Outcomes Have Varied Sharply in Trials of Mothers Who Kill Kids*, ASSOCIATED PRESS, Aug. 10, 2001.

⁶⁶ See Emily Yellin, *Arkansas Executes a Woman Who Killed Both Her Children*, N.Y. TIMES, May 3, 2000, at A22.

⁶⁷ Rick Bragg, *Life of a Mother Accused of Killing Offers No Clues*, N.Y. TIMES, Nov. 6, 1994, at A1.

⁶⁸ Megan K. Stack, *Killings Put Dark Side of Mom’s Life in Light*, L.A. TIMES, Jul. 8, 2001, at A20.

severely depressed and unbalanced person, although, in the beginning, the media pointed to her Christian fundamentalism and allegedly authoritarian husband.⁶⁹

Are women treated differently from men? In the case of Tabitha Pollock and other cases like Linda Kee or Andrea Bone, the mother was charged with the murder of her child that her boyfriend actually committed,⁷⁰ but Andrea Yates's husband was not held responsible legally for failing to recognize his wife's depression as potentially dangerous to his children. Nor was Natalia Higier's husband Louis, who initially laughed when police questioned him about the child's injuries, charged.⁷¹

Regardless of whether the law treats men and women differently, we know that female jurors may condemn differently. Research shows that in negligence cases, female jurors rated defendants' behavior as more outrageous than male jurors do.⁷² Women perceived more punitive intent and recommended higher punitive awards.⁷³ Moreover, women were most punitive and most outraged when the defendant was a woman.⁷⁴ Are women acting as guardians of maternal care? Do they act as "honorary" men, keeping women in line with regard to their mothering role? Or, do they value care more and condemn it more heartily? Is a woman's refusal to care, that urge to walk away, more frightening to female jurors? Coming from a position of dependence, which in many communities still characterizes financial relations between men and women, is the refusal to take care even more personally frightening?

Problems of unfairness arise when the law expresses these deepest and most profound impulses, in a way that makes condemnation a defense against our fears of our own impulses as well as our basic insecurities about lack of care. The treatment of individuals as representatives of larger institutions, both real and psychological, poses a problem to a system that prizes autonomy and agency. And the enactment of rage onto institutions and persons without an examination of our own fears guarantees overreaction and even, at times, cruel

⁶⁹ See, e.g., Bonnie Miller Rubin, *Texas Mom's Murder Trial Elicits Outrage*, CHI. TRIB., Mar. 7, 2002, at 4.

⁷⁰ See *supra* notes 60-64.

⁷¹ See Szaniszlo & Weber, *supra* note 63.

⁷² Sunstein et al., *supra* note 55, at 2100.

⁷³ *Id.*

⁷⁴ *Id.*

punishment. We must examine the way we condemn and the punishments we inflict that are based on fear. In addition, the law may benefit from an examination of how other institutions operate to soothe fears and constrain rageful acting out. I turn now to the family as one such institution that deals with fear and examine which practices best produce moral citizens.

III. PARENTING AND THE LAW

Because expressions of condemnation, motivated by fear and self-preservation, have their roots in family life, parenting practices can be used to understand how the law might best soothe certain impulses that underlie our need to condemn. In its socialization of our youngest moral citizens, the family doles out punishments and addresses fears and insecurities; the way parents, or parental figures, take care—the way they judge, provide support and instill cultural values—forms the foundation of our moral impulses.

Proposing parenting as a model for the state in relation to its wrongdoers, though, is risky business. It flies against our liberal notions of individual autonomy, and it seems to demean citizens to the level of children, while elevating the state to a false hierarchical position of parental overseer. This understanding, however, derives from the fact that parenting is often construed as only a heteronymous relationship, where the “law” of the family is handed down in absolute edicts from adults who are superior in every way to the ones over whom they rule. We use words like “paternalistic” and “patriarchal” not only to describe the rule of the father, but also to describe organizations that depend on hierarchy and prescribe the laws and to describe systems where the rule maker does not give due agency to the person or persons under her care.⁷⁵

This may be a distorted or one-sided view of parenting, for parents can be more than law makers. Elements of caretaking, for example, which are integral to the problematic institution we call the family, can counteract coercive and hierarchical elements.⁷⁶ These two functions of the family have

⁷⁵ Indeed, an honest assessment of the family does support a view of it as a deeply problematic institution. My analysis seeks not to deny it but rather to uncover other aspects of family life that co-exist with the hierarchical, patriarchal rule that also is foundational. See CAROL GILLIGAN, *THE BIRTH OF PLEASURE* (2002).

⁷⁶ This is a notion set forth by Carol Gilligan in *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1989).

been historically represented as a gendered split, with the father representing the rule-enforcing and rule-setting function while the mother represents the care-taking function. Such a split is reflected in our legal institutions where the therapeutic is kept at a distance rather than embedded within the system, as it has been in periods where rehabilitative ideas are prominent.⁷⁷

Parenting, like law, is a system in which those under its care are brought to understand and eventually internalize the law. However, over and over again, research and clinical material suggest that family discipline enforced without love, guidance and care does not produce children who love the law and internalize it as their own.⁷⁸ Instead, it produces either empty or fearful do-gooders or rebellious rule breakers.

Research on parenting behaviors has shown that the "authoritarian parent" or the parent who uses "power assertion" produces children who are angry and aggressive,⁷⁹ who fail to internalize moral values⁸⁰ and who do not develop a coherent sense of conscience.⁸¹ Children whose parents use withdrawal of love to socialize moral behavior may inhibit misbehavior, comply with rules and show self-control; however, these children do so to feel less anxious rather than as an expression of moral standards.⁸² In contrast, the *authoritative* parent uses firm standards and control, communicated with warmth and nurturance to produce children who respect and internalize the law.⁸³ These kinds of parents confront children with the consequences of their acts and the harm to victims,

⁷⁷ See Garland *supra* note 9 about this split between the legal and the therapeutic.

⁷⁸ Perhaps this observation prompts Judge Judy Mitchell-Davis to hug and kiss juvenile wrongdoers in drug treatment court in Chicago. See Adam Lasker, *Her Stock in Trade is "Therapeutic Jurisprudence,"* CHI. DAILY L. BULL., June 13, 2001, at 3.

⁷⁹ See Leonard D. Eron et al., *The Convergence of Laboratory and Field Studies of the Development of Aggression*, in DETERMINANTS AND ORIGINS OF AGGRESSIVE BEHAVIOR 347-80 (J. de Wit & W. W. Hartup eds., 1974), cited in DANIEL K. LAPSLEY, MORAL PSYCHOLOGY, at 191 (1996).

⁸⁰ See Martin L. Hoffman, *Moral Internalization, Parental Power, and the Nature of Parent-Child Interaction*, 11 DEVELOPMENTAL PSYCHOL. 228 (1975).

⁸¹ See Grazyna Kochanska, *Socialization and Temperament in the Development of Guilt and Conscience*, 62 CHILD DEV. 1379 (1991).

⁸² See LAPSLEY, *supra* note 79, at 191.

⁸³ See Diana Baumrind's original work *Current Patterns of Parental Authority*, 4 DEVELOPMENTAL PSYCHOL. MONOGRAPHS 1 (1971) and more recently *The influence of Parenting Style on Adolescent Competence and Substance Use*, 11 J. EARLY ADOL. 56 (1991). See also L. Steinberg et al., *Authoritative Parenting and Adolescent Adjustment Across Various Ecological Niches*, 1 J. RES. ON ADOL. 19 (1991).

show a commitment to the standards they set by noting them consistently and communicate generally that it is "good" to obey legitimate authority.⁸⁴ Through care, warmth and nurturance, they convey to the child that he is a worthwhile human being even though he might have done something condemnable. The implication is that condemnation alone, without warmth, won't work with children. When a parent neither withdraws from the relationship nor indulges his or her own aggressive impulses, the parent generally produces children who feel safer in the world and who obey the law not because it is imposed from above but because it is theirs too—they understand it.

The goal of parenting vis-à-vis moral values is to hope for and support increased agency, internalization, self-regulation and understanding with regard to laws of behavior. Within the family, shaming techniques and love withdrawal are the least effective means of fostering internalization of morality. Children who fear being shamed may avoid wrongful behavior due to anxiety, but they are unlikely to develop a relation to the law that is meaningful and makes them a full citizen to that law. And why? Shaming makes one want to hide; it doesn't produce pro-social behavior in wrongdoers; it increases internal fantasies of revenge; and it can provoke the child to externalize blame and act out.⁸⁵ Finally, shaming can reduce empathy.⁸⁶

The alternative to shaming is not allowing children to do as they wish, but rather inducing guilt through relationship and a strong commitment to standards of behavior. Morris writes that in a "guilt morality," what is valued is "a relationship with others . . . With guilt we have a conceptual scheme of obligations and entitlements (leading to) the idea of

⁸⁴ LAPSLEY, *supra* note 79, at 192.

⁸⁵ See Tamara J. Ferguson & Hedy Stegge, *Emotional States and Traits in Children: The Case of Guilt and Shame*, in SELF-CONSCIOUS EMOTIONS: THE PSYCHOLOGY OF SHAME, GUILT, EMBARRASSMENT, AND PRIDE 174 (June Price Tangney & Kurt W. Fischer eds., 1995) (discussing guilt-producing and shame-producing parenting practices); LEWIS *supra* note 7 (describing the results of shaming); June Tangney, *Shamed Into Anger? The Relation of Shame and Guilt to Self-Reported Anger and Aggression*, 62 J. PERSONALITY & SOC. PSYCHOL. 669 (1992) (same). See also Marlene M. Moretti & E. Tory Higgins, *The Development of Self-System Vulnerabilities: Social and Cognitive Factors in Developmental Psychopathology*, in COMPETENCE CONSIDERED 286 (Robert J. Sternberg & John Kolligian, Jr. eds., 1990).

⁸⁶ Janice Lindsay-Hartz, *Contrasting Experiences of Shame and Guilt*, 27 AM. BEHAV. SCIENTIST 689 (1984).

owing something to others . . . With guilt one's status is intact but one's relationship to others is affected."⁸⁷

How do parenting practices relate to our urge to condemn? Those who socialize through shaming, giving "deficiency messages," threatening separation and blatantly shaming the child, arouse fear of abandonment and produce a fundamental insecurity that can not be relieved because the only way to please the parent is to change the core self.⁸⁸ Those children who have received the kind of parenting that addresses fundamental fears and insecurities, even when they do wrong, will need to condemn less. As adults, they will be less inclined to clamor for protection when the slippery sidewalk or the sniper arouses early fears, and will be less likely to need to defend against this panic by seeking aggressive satisfaction in overly harsh sentencing of criminals or high punitive damage awards.⁸⁹

In addition, what we have learned about parenting that instills internalized moral values suggests that the acting out of condemnation through shaming techniques, exorbitant awards or overly harsh sentences does little to promote rehabilitation. I further suggest that when the law acts on feelings of condemnation, on its moral outrage, there are psychological as well as social costs.

IV. SHAMING VS. APOLOGY IN THE COURTS

Dan Kahan argues that shaming penalties "unambiguously express condemnation and are a feasible alternative to imprisonment for many offenses."⁹⁰ He divides shaming practices into four categories: (1) those that stigmatize through publicity; (2) those that literally stigmatize; (3) self-debasement; and (4) contrition. I deal with contrition separately from the other three and argue that it need not be a form of shaming.⁹¹ Professor Kahan argues that shaming

⁸⁷ See HERBERT MORRIS, ON GUILT AND INNOCENCE 60-62 (1976) (noting that messages that convey the child is not good enough or that there is something fundamentally wrong with them).

⁸⁸ T.R. POTTER-EFRON, SHAME, GUILT, AND ALCOHOLISM: TREATMENT ISSUES IN CLINICAL PRACTICE (1989).

⁸⁹ See Albert A. Ehrenzweig, *A Psychoanalysis of Negligence*, 47 NW. U. L. REV. 855, 856 (discussing our insistence in finding fault when there is none as a way we "clamor for protection").

⁹⁰ Kahan, *Alternative Sanctions*, *supra* note 4, at 594.

⁹¹ *Id.* at 631.

resonates with the public, and indeed it does.⁹² It expresses some of our strongest negative emotions, such as hate, disgust and moral outrage. But should we look for a punishment that unambivalently expresses our strongest negative emotions?

To answer that question, we may draw on experiences with shame in our culture, independent of our family experiences. American junior and senior high school students are notorious for shaming practices, especially among boys.⁹³ Recent work on girls' relationships discusses a more verbal, class-related form of shaming that occurs.⁹⁴ While peers shame girls for not wearing clothing from the right stores, boys will be shamed for any behavior that appears feminine, for being too eager in class, for looking weak or for tattling. The quintessential shaming speech act currently in our culture is to call a boy a "fag."⁹⁵ The quintessential shaming act (memorialized in several teen movies) is to dunk his head in a toilet while others look on and laugh. This latter example clearly illustrates Toni Massaro's point that shame is not a discrete emotion but involves embarrassment, humiliation and mortification "in porous ways."⁹⁶ Lest we think that shaming is nothing more than a sign of immaturity, we should recall that shaming is also an all too common parenting practice. Yet, as noted above, researchers and clinicians alike have found that shaming as a parenting practice produces aggressive or tortured individuals.⁹⁷

In a 1996 article, Kahan cites a 1995 *Newsweek* poll indicating that the public is prepared to endorse shaming penalties with enthusiasm.⁹⁸ For Kahan, this is one reason punishments *should* express appropriate condemnation, consistent with desert and equality—because they represent

⁹² *Id.* at 637.

⁹³ See DAN KINDLON & MICHAEL THOMPSON, *RAISING CAIN: PROTECTING THE EMOTIONAL LIVES OF BOYS* (1999).

⁹⁴ See LYN MIKEL BROWN, *GIRLFIGHTING* (2003); RACHEL SIMMONS, *ODD GIRL OUT: THE HIDDEN CULTURE OF AGGRESSION IN GIRLS* (2002); LAMB, *supra* note 44.

⁹⁵ Michael Kimmel, Mars, Venus, of Planet Earth, Speech given at Saint Michael's College, Colchester, VT (Oct. 2002) (on file with author).

⁹⁶ Massaro, *supra* note 5, at 89. For a complete discussion of shame and the law, see Toni M. Massaro *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUBLIC POLICY & L. 645 (1997).

⁹⁷ DONALD L. NATHANSON, *SHAME AND PRIDE: AFFECT, SEX, AND THE BIRTH OF THE SELF* (1992).

⁹⁸ Kahan, *Alternative Sanctions*, *supra* note 4, at 637 (citing Jonathan Alter & Pat Wingert, *The Return of Shame*, NEWSWEEK, Feb. 6, 1995, at 21).

the public's emotional response and desires.⁹⁹ He describes the waning of the use of corporal punishment as due to its inconsistency with democratic principles. Corporal punishment, it was believed, reflected a monarchical, hierarchical, master/slave relationship between the law and the wrongdoer. Kahan writes that "[s]haming penalties are free of any historical association with slavery or *other* forms of inequality,"¹⁰⁰ a very odd conclusion given the longstanding practice in this country of masters humiliating slaves, straight men humiliating gay men, and men humiliating women through unwanted sex acts. Shaming is indeed a practice that evokes superior/inferior relations, a practice through which (as any junior high schooler will tell you) "in" groups make "out" groups feel inferior and unwanted: rejected.

As with the socialization of children, criminals and other wrongdoers will derive little benefit from wholesale rejection and the ending of a relationship through shaming acts. Instead, as in good parenting practices, we want the relationship between wrongdoer and those he has offended to be salient. We want wrongdoers, when they have done something wrong, to feel not only that they have not acted according to their own standards of behavior but also that they have somehow hurt us. Jeffrie Murphy makes this point nicely in his discussion of the story of Adam and Eve as a narrative that is not only about disobedience to authority but also about the transforming of the relationship between Adam, Eve and God.¹⁰¹

While shame is a moral emotion, and it may be good to feel ashamed for some of the things we have done, producing shame in another person is a different story. We might assume that if shame is a good moral reaction to a bad act, then the induction of shame may be appropriate. But self-produced shame is different from externally produced shame. It comes from a feeling that one has done something that is so wrong one feels embarrassed, humiliated and deeply and profoundly bad. Self-produced shame reflects a conflict between the kind of person we are and who we had hoped we were. Shame derived from external sources is something altogether different, and perhaps we might find a different word for it. Degradation and

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 647.

¹⁰¹ Murphy, *supra* note 22, at 333-35.

humiliation are two words Murphy suggests, and these do not strike at the core of the moral self.¹⁰²

In condemning, if we do not aim to degrade and humiliate, we aim to make the wrongdoer suffer and, perhaps, to be afraid and to comply with the law out of fear of being ashamed again. But here is the cost to those who condemn. When we act on our aggressive impulses and project our own unwanted fear and insecurity onto others, we will never feel completely safe. When we brutally punish or condemn others to produce shame, we raise two unconscious fears—that we too might be brutally punishable and that the world is very, very unsafe. Linda Ross Meyer raises this point with regard to shaming and the moral worth of human beings, arguing that tying a victim's moral worth to the offender's punishment is senseless.¹⁰³ This externally produced shame never redresses an imbalance because one cannot assert the moral worth of one person by denying the moral worth of another.¹⁰⁴

In contrast to shaming practice, apology may produce positive results for the wrongdoer and society. Melanie Klein found that all infants harbor deep aggressive impulses born of frustration and noted that adults carry the worry of these impulses throughout their lives.¹⁰⁵ She suggested that only through acts of reparation can a soul find relief for those internal fears.¹⁰⁶ Thus, acts of apology, even forced apologies, seem to me something apart from shaming techniques and should not be considered a variety of "shaming practice."¹⁰⁷ While such practices can evoke shame in the apologizer, they are not generally meant to shame, and thus the distinction between self-produced shame and externally produced shame remains intact. Apologies reconnect the wrongdoer to some party he or she has wronged, if only briefly, whether it is an individual or society. Apologies assert the wrongdoer's moral worth because he or she is not rejected but rather is brought back into however tenuous a relationship.

¹⁰² Murphy, *supra* note 11, at 24-28.

¹⁰³ Linda Ross Meyer, *Forgiveness and Public Trust*, 27 FORDHAM URB. L.J. 1515, 1526 (2002).

¹⁰⁴ *Id.*; James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1997).

¹⁰⁵ See KLEIN & RIVIERE, *supra* note 19.

¹⁰⁶ *Id.*

¹⁰⁷ Kahan, *Alternative Sanctions*, *supra* note 4, at 631.

Apology is distinct from remorse, because the former is an act rather than a feeling and can be performed devoid of feeling. However, apology makes remorse possible in a way that the experiencing of shame may not. Lawrence Voogel, writing on moral responsibility, claims that blameworthiness depends on one's capacity to be influenced by the world in the right way as well as one's capacity for proper sensitivity. When we make criminals monsters in order to justify acting on moral outrage and feelings of condemnation, we make them less blameworthy. When we ask for an apology, we hope this act will influence them and suspect that they have the proper sensitivity to carry it out.

Some emotion theory suggests that performing the act associated with the emotion can create the experience of the emotion: "By acting the part of one affected by a given emotion, one can actually awaken some of the feeling characteristic of it."¹⁰⁸ If holding our faces in a smiling position makes us feel happier,¹⁰⁹ perhaps because the physiology suggests happiness or because the cognitive associations with that position are evoked through bodily memory, why not ask wrongdoers to enact remorse. In so doing, wrongdoers may actually feel it, and such remorse, more than shame, may work toward deterrence.

Genuine remorse is, of course, better than remorse simply acted and is one of the best possible outcomes of any wrongdoer's punishment from the perspective of making us all feel safer. According to Nicholas Tavuchis, apologies make us feel safer.¹¹⁰ As symbolic expressions of genuine remorse, they are "quintessentially social . . . a *relational* symbolic gesture occurring in a complex interpersonal field, with enormous reverberatory potential that encapsulates, recapitulates, and pays homage to a moral order rendered problematic [and unsafe] by the very act that calls it forth."¹¹¹ Thus, where degradation and humiliation—external shaming—fail to achieve their desired ends, apology may better approximate self-produced shame and its ascendant social benefits.

¹⁰⁸ David Pugmire, *Real Emotion*, 54 PHIL. & PHENOMENOLOGICAL RES. 105, 115 (1994).

¹⁰⁹ J. D. Laird, *Self-attribution of Emotion: The Effects of Expressive Behavior on the Quality of Emotional Experience*, 29 J. PERS. & SOC. PSYCHOL. 475 (1974).

¹¹⁰ NICHOLAS TAVUCHIS, *MEA CULPA* 14 (1991).

¹¹¹ *Id.* See *Mea Culpa* for an excellent discussion of the function of apology.

I have argued in this Article that feeling safe and secure is dependent on a variety of factors, some of which are independent of the law. When we are allowed to express our most aggressive feelings through the law, however symbolically, the risk "of disproportionate punishments" is that much higher,¹¹² and we never deal with the fear within. Thus, the fear within remains a hidden, yet motivating force and we make others symbolically express that fear for us through experiencing our condemnation and punishment. Naturally we try to deal with our fears through aggression against those who mean us harm; but the restraint of the aggressive impulse, and the opportunity to witness symbolically the remorse of wrongdoers, addresses our fears and creates a counteractive feeling of safety.

Currently, the law allows us to address our fear through the pleasure of retribution. Psychoanalytic theory, however, suggests that such pleasure has its costs. It raises other fears, like the fear of our own impulses—our inability to contain our aggression. When we allow for apology, and when courtrooms give room for remorse, above and beyond the blatantly coercive space for remorse that now exists, we will have less need to see wrongdoers as monsters, less need to turn our fear of our own aggression into disproportional punishments of others who have acted on their aggressive impulses or their own fears.

V. CONDEMNATION AS SYMBOLIC EXPRESSION

Condemnation through the law serves an important expressive function for the culture in the way it reaffirms the kinds of behavior we support and the kinds of behavior we condemn. But it also functions on an individual level by giving expression to the kind of person each of us feels we are, based on the kinds of things we condemn as well as the ferocity of our condemnation. On this individual level, condemnation expresses our relationship to our own "bad" impulses, those that urge us toward selfish and aggressive acts,¹¹³ as well as to our fears concerning our frailty, our dependence on other people and our smallness in relation to larger events and institutions. In its social function, however, there is a burden to insure that what the law expresses is consistent with larger

¹¹² Massaro, *supra* note 5, at 99.

¹¹³ See Ehrenzweig, *supra* note 89.

social goals and not merely an expression of individual psychological motives, which are often, at heart, contradictory. The urges to shame and wreak revenge, although deep-seated emotions, are not unambiguously experienced or felt. To yoke the law in any one case to only this defensive impulse does a disservice not only to the legal system but also to those who want revenge but are unaware of their more subtle and mixed motives.

If the law is an expression of cultural values, values that children, and all citizens hopefully, wish to obtain, it cannot only condemn wrongdoers; the law must also provide standards and moral ideals. Freud argued that the super ego, that symbolic structure from which moral judgment arises, was not only a restraining, condemning, harsh inner parental voice but also the bearer of ego ideals without which the burden of morality would be that much harder to bear.¹¹⁴ Tom Tyley wrote that the "law moralizes through good will. Individuals are more disposed to obey particular laws, whether or not those laws accord with their moral beliefs when they perceive the criminal law as a whole to be basically just."¹¹⁵ I suggest this observation becomes even more accurate when they perceive the law to be high minded, to elevate and to be more than simply responsive to their baser impulses.

Condemnation through acts of shaming, exorbitant jury awards and overly harsh sentencing, while it expresses and satisfies our impulses to punish and seek revenge, does not address the ideals of our society very well. Instead, in getting revenge or meting out a severe punishment, we may feel satisfied and superior to the offender who is made to suffer, but that superiority comes from a denial of those impulses in ourselves, a projection of those impulses onto the other, an other that we create as a monster and thus as little like us as possible.

Is condemnation then always suspect? Will we always be able to ask of those who condemn, have you looked at yourself too? Is there any act that deserves our total and most unambivalent condemnation? There may be acts that deserve the full strength of our condemnation. Even so, we ought to

¹¹⁴ FREUD, *supra* note 28.

¹¹⁵ TOM R. TYLEY, WHY PEOPLE OBEY THE LAW 62 (1990) (*quoted in* Kahan, *Alternative Sanctions*, *supra* note 4, at 604).

fully examine the social costs of expressing that emotion as fully as we can.